FOR ARGUMENT

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 78-58

G. GARVIN BROWN, III,

Petitioner,

v.

MARK PAUL FELSEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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January 22, 1979

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ARGUMENT

While Respondent's brief accurately recites the position of the Tenth Circuit in *In re Nicholas,* 510 F.2d 160 (10th Cir.), *cert. denied,* 421 U.S. 1012 (1975), this does not make its rationale any more persuasive. Respondent conjures up a bevy of so-called solutions available to a creditor in State Court if he wishes to preserve the claim of nondischargeability for a later determination in Bankruptcy Court.

None of these solutions can or should alter the consideration that the Bankruptcy Court shall give to the issue of dischargeability. The elements of fraud to be pleaded in State Court, which Respondent has detailed for this Court, are not the same as those for nondischargeability under the Bankruptcy Act. Conspicuously absent from Respondent's description of fraud in Colorado is the intent to deceive, which is the gravamen of a nondischargeable debt. Under no circumstances would this element be raised in a State Court proceeding even if fraud were the exclusive claim, and the State Court judgment and record will not, and indeed cannot, make a determination of this. Dischargeability is a federal question not a state question. The elements of the claims of dischargeability and fraud are not mere copies, and the State Courts have no jurisdiction to consider the issue of dischargeability.

There is no question that the Bankruptcy Court must consider the issue of dischargeability of a debt. The question is whether they are bound by the State Court judgment and record where there is no need to raise the issues of fraud and dischargeability. Form alone should not prevent an inquiry into the presence of fraud. The point of inquiry under § 17a (2) of the Bankruptcy Act is not in what form is the debt now evidenced, but how was the debt created? The defrauded creditor should not be penalized for taking the simplest road to judgment. The fact that a claim has been reduced to judgment should not preclude the Bankruptcy Court from inquiring into the nature of the debt underlying it where such inquiry may disclose the "rot of fraud".

Respondent claims that such a review *de novo* by the Bankruptcy Court means an abolition of the doctrines of *res judicata* and collateral estoppel. But this is not the case. The judgment and record here, and in similar cases, show not that a court already considered and passed on certain

issues, but rather that there was no consideration of the issues that the words of Section 17a give rise to. Professor Cowans has stated:

> "It seems possible to interpret the new law as meaning that if a non-bankruptcy court has made a determination as to factual issues essential to determining the dischargeability of a debt and has used the standards applicable under Section 17 in a case in which the issue was really contested before it, the determination should not be disregarded. Anything less than that such as a default, a failure to plead a discharge, a failure to consider the matter, a lack of appropriate findings of fact or other lack of clarity in what the court did should not result in the application of the doctrines of res judicata or collateral estoppel." Cowans, *Bankruptcy Law and Practice,* § 433, 1972 Supp. p. 104.

Respondent also suggests that a distinction should be drawn between a default judgment and a consent judgment for the purposes of a Bankruptcy Court review. The Tenth Circuit, however, has drawn no such distinction. In *In re Nicholas, supra,* the New Mexico State Court judgment at issue was a default judgment, while here, the State Court judgment reviewed by the Tenth Circuit was a stipulated judgment. The outcome was the same in both instances. Even though the courts have drawn distinctions between consent and default judgments in some circumstances, this is not the case in bankruptcy decisions. Respondent implies that because it was a stipulated judgment, Petitioner could have as part of the negotiations insisted on the inclusion of findings or terms covering the problem faced here. Respondent apparently ignores the well settled rule that advance agreements which waive the benefits of a discharge are void. *Fallick v. Kehr,* 369 F.2d 899 (2d Cir. 1966). The parties thus could not effect a binding agreement regarding

the nature of this debt, and therefore its dischargeability, as part of the stipulated judgment.

The approach suggested by Respondent, that the parties be bound by State Court judgments, will cause grave problems to debtors, the very problems the 1970 Amendments were adopted to cure.

CONCLUSION

For the reasons set forth herein and in the Brief for the Petitioner, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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